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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

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Ex parte Tom Fredricks

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS**

(In re: Tom Fredricks

v.

**John McMillan, in his capacity as State Treasurer; Dr. Kathleen
Baxter, in her capacity as State Comptroller; and Kelly Butler,
in his capacity as State Finance Director)**

**(Montgomery Circuit Court, CV-19-900579;
Court of Civil Appeals, 2190593)**

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MENDHEIM, Justice.

WRIT QUASHED. NO OPINION.

Shaw, Bryan, Sellers, and Mitchell, JJ., concur.

Parker, C.J., and Bolin,* Wise, Mendheim, and Stewart, JJ., concur specially.

*Although Justice Bolin did not sit for oral argument of this case, he has reviewed a recording of that oral argument.

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BOLIN, Justice (concurring specially).

I agree with the decision to quash the writ of certiorari granted in this case to review whether the allocation in the Rebuild Alabama Act ("the RAA"), Act No. 2019-2, Ala. Acts 2019 (1st Spec. Sess.) of excise-tax revenues to fund improvements to the Mobile Ship Channel is constitutional under Amendment No. 93 to the Alabama Constitution of 1901 (now Art. IV, § 111.06, Ala. Const. 1901 (Off. Recomp.), which was adopted in 1952). I recognize that the quashing of the writ of certiorari, although leaving the Court of Civil Appeals' affirmance of the trial court's judgment in effect, see State Dep't of Revenue v. HealthSouth Corp., 121 So. 3d 334, 334 (Ala. Civ. App. 2013), constitutes no expression of approval on the merits of the opinion of the Court of Civil Appeals. See Ex parte Jenkins, 723 So. 2d 649, 658 n.13 (Ala. 1998). I write specially to express my view that the Court of Civil Appeals correctly held that the term "public highways" as used in Amendment No. 93 properly embraces any thoroughfare used by the public, whether on land or on water.

Amendment No. 93 allows the expenditure of funds raised through the collection of gasoline and diesel-fuel excise taxes levied by the State

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to defray the cost of "construction," "reconstruction," "maintenance," and "repair" of "public highways" -- a term that has a generally accepted meaning, as the former Court of Appeals made clear in Pappenburg v. State, 10 Ala. App. 224, 65 So. 418 (1914), that includes any thoroughfare used by the public, whether on land or on water, in accordance with Art. I, § 24, Ala. Const. 1901 (Off. Recomp.) ("[A]ll navigable waters shall remain forever public highways, free to the citizens of the state and the United States, without tax, impost, or toll"). The RAA allocates funds raised through the collection of certain excise-taxes to defray financial obligations incurred by the Alabama Highway Finance Corporation (an instrumentality of the State) to finance improvements to the Mobile Ship Channel, a body of water that, the parties stipulated, is navigable. Had the legislature intended to adopt a new definition of "public highways" in Amendment No. 354 to the Alabama Constitution of 1901,¹ as argued by

¹Amendment No. 354, adopted in 1975, did not alter the pertinent language of Amendment No. 93 as originally ratified; the 1975 amendment instead added other provisions concerning personalized special motor-vehicle license plates. See generally Ala. Const. 1901 (Off. Recomp.), Art. IV, § 111.06.

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the plaintiff, it could have done so. Therefore, the allocation in the RAA of excise-tax revenues to fund improvements to the Mobile Ship Channel was a constitutional exercise of the legislature's power under Amendment No. 93.

I recognize that cases of this importance, involving constitutional issues that concern other branches of government and the appropriation and use of funds raised through the collection of taxes imposed on the citizenry, normally merit an opinion from this Court. Therefore, although I agree to quash the writ of certiorari, I submit this special writing agreeing with, and approving of, the rationale of the Court of Civil Appeals in Fredricks v. McMillan, [Ms. 2190593, Nov. 5, 2020] __ So. 3d __ (Ala. Civ. App. 2020).

Parker, C.J., and Wise, J., concur.

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MENDHEIM, Justice (concurring specially).

I concur in the decision to quash the writ of certiorari. I write separately to clarify an issue concerning the process of transferring a case to the Court of Civil Appeals. Doing so requires relating a portion of the procedural history in this case to provide context for the transfer issue.

On April 14, 2020, the Montgomery Circuit Court entered a summary judgment in favor of the defendants, i.e., John McMillan, in his capacity as State Treasurer; Dr. Kathleen Baxter, in her capacity as State Comptroller; and Kelly Butler, in his capacity as State Finance Director, and denied Tom Fredricks's motion for a summary judgment. On April 28, 2020, Fredricks filed a notice of appeal to the Court of Civil Appeals. The docketing statement accompanying Fredricks's notice of appeal described the facts of the case as follows:

"The facts are agreed on per the parties. The state wishes to fund the dredging project in [M]obile [B]ay with revenue from the gas tax passed as part of the Rebuild Alabama Act, which purports to authorize such funding. We contend that this is flatly unconstitutional due to Alabama Constitutional Amendment 354."

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The docketing statement also described the issue in the case to be "whether the application of gas tax revenue to the dredging of [M]obile [B]ay is barred by the Alabama State Constitution."

On June 4, 2020, the Court of Civil Appeals transferred this case to this Court. Presumably, the Court of Civil Appeals did so based on § 12-2-7(6), Ala. Code 1975, which provides, in part:

"The Supreme Court shall have authority:

"....

"(6) To transfer to the Court of Civil Appeals, for determination by that court, any civil case appealed to the Supreme Court and within the appellate jurisdiction of the Supreme Court, except the following:

"a. A case that the Supreme Court determines presents a substantial question of federal or state constitutional law."

(Emphasis added.) Although it is not a model of clarity, § 12-2-7(6) indicates that certain categories of cases should be reviewed by the Alabama Supreme Court rather than by the Court of Civil Appeals, and one such category encompasses cases that "the Supreme Court determines

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present[] a substantial question of federal or state constitutional law." The Court of Civil Appeals presumably noticed that Fredricks was raising a constitutional challenge to the Rebuild Alabama Act, Act No. 2019-2, Ala. Acts 2019 (1st Spec. Sess.), and thus transferred the case to this Court.

On June 10, 2020, the Supreme Court Clerk's Office transferred the case back to the Court of Civil Appeals, citing § 12-2-7(6) as authority for doing so. I note that the Supreme Court of Alabama Internal Rules, Rule XIV, which concerns the "Responsibilities of the Clerk's Office," contains a subsection that expressly delegates to the Clerk of the Alabama Supreme Court the authority "[t]o transfer only direct appeals to the Court of Civil Appeals under the provisions of § 12-2-7(6), Ala. Code 1975. (See this Court's November 3, 2016, order located in the Court's Minute Book entitled 'Regular Term 2016-2017.')." Rule XIV. C.9., Supreme Court of Alabama Internal Rules (as amended effective March 26, 2021). When a case is transferred to the Court of Civil Appeals pursuant to this rule, the members of this Court do not review the transfer. I also note that when the Clerk evaluates whether to make such a transfer, the Clerk does

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not have the benefit of the parties' briefs or the record on appeal to make the determination. The Clerk only has available the notice of appeal and the docketing statement filed by the appellant. Moreover, in this case, unlike in most cases before this Court, the docketing statement was the form used for appeals to the Court of Civil Appeals because Fredricks chose to file his appeal with that court rather than this Court. This was potentially significant because the docketing-statement form used for appeals to this Court -- unlike the form used for appeals to the Court of Civil Appeals -- contains a section that specifically asks the appellant whether Rule 44, Ala. R. App. P., the rule that requires service of the party's brief on the Attorney General of Alabama or the chief legal officer of the governmental body whose authority is questioned when an appeal raises a constitutional question, has been complied with.

This Court's Internal Rules also provide that if a motion to reconsider a transfer of a case to the Court of Civil Appeals is filed by a party to the case in question, the Clerk has the authority

"[t]o grant a motion to reconsider a transfer to the Court of Civil Appeals pursuant to § 12-2-7(6) or to grant an objection to such a transfer. Should the Clerk determine that a motion

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to reconsider a transfer to the Court of Civil Appeals pursuant to § 12-2-7(6) should be denied or the objection to the transfer is meritless, the Clerk shall place the motion/objection with a recommendation on the next Miscellaneous Docket for the Court's consideration."

Rule XIV. C.10. Thus, once a motion to reconsider a transfer is filed, and the Clerk recommends that the motion should be denied, the members of this Court will review whether the transfer is proper under § 12-2-7(6). No such motion was filed by either Fredricks or the defendants in this case, so the case was transferred to the Court of Civil Appeals.

On November 5, 2020, the Court of Civil Appeals issued an opinion affirming the circuit court's judgment. The Court of Civil Appeals included a footnote in the opinion addressing its view of our Clerk's transfer of the appeal:

"Subsection a. of § 12-2-7(6) excludes from the class of transferrable appeals those civil cases that our supreme court determines 'present[] a substantial question of federal or state constitutional law.' Pursuant to Ala. Code 1975, § 12-3-16, this court is bound by decisions of our supreme court, and we may infer that that court has determined that no substantial question of state constitutional law is present in this case. Cf. Young v. Ledford, 37 So. 3d 832, 832 n.1 (Ala. Civ. App. 2009) (similarly inferring determination that transferred appeal did not involve resolution of ' "novel legal question" '

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having '"significant statewide impact,"' which, under § 12-2-7(6)b., would have precluded that transfer)."

Fredricks v. McMillan, [Ms. 2190593, Nov. 5, 2020] ___ So. 3d ___, ___ n.3 (Ala. Civ. App. 2020) (emphasis altered).

As my rendition of the procedural history of this case and my summary of this Court's Internal Rules pertaining to transfers of cases to the Court of Civil Appeals hopefully make clear, the inference the Court of Civil Appeals made concerning the transfer of this case to that Court is not correct. A procedural deflection of a case by the Supreme Court Clerk to the Court of Civil Appeals does not constitute a determination by this Court that a case does not involve a "substantial question" of constitutional law. No such conclusion concerning a case should be read into such a transfer. I acknowledge that some confusion on that point could be attributed to the fact that Fredricks's docketing statement distinctly referenced a constitutional question, and yet our Clerk transferred the case back to the Court of Civil Appeals. Even so, I note that the confusion probably could have been avoided altogether if Fredricks had initially appealed the case to this Court. At the same time,

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I wish to emphasize that a party should feel free to file a motion to reconsider a transfer if a party feels strongly that a case belongs in this Court because, assuming the Clerk recommends denying the motion, the transfer question will be reviewed by the members of this Court.

Stewart, J., concurs.